



FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1473

RIN 3076-AA15

Administrative Guidance

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Final rule.

SUMMARY: This final rule sets forth the Service’s procedures governing the issuance of guidance documents as required by the Executive order titled “Promoting the Rule of Law Through Improved Agency Guidance Documents”.

DATES: Effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Sarah Cudahy, Office of the General Counsel, 202-606-8090, scudahy@fmcs.gov.

SUPPLEMENTARY INFORMATION: This final rule, which adds to the Code of Federal Regulations at 49 part 1473, is adopted pursuant to Executive Order 13891, titled: “Promoting the Rule of Law Through Improved Agency Guidance Documents” (October 9, 2019). In that Executive order, Federal agencies are required to finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents.

Administrative Procedure

Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of agency organization, procedure, or

practice. See 5 U.S.C. 553(b)(3)(A). As this final rule merely codifies procedures applicable to the Service's administrative procedures into the Code of Federal Regulations, notice and comment are not necessary.

Rulemaking Analyses and Notices

A. Executive Order 12866

The Office of Management and Budget has determined that this rulemaking is not a significant regulatory action under Executive Order 12866. The Service does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a rule of agency procedure and practice. The final rule describes the Service's procedures for processing of guidance documents. The Service has adopted these internal procedures as required by Executive Order 13891, and has not incurred any additional resource costs in doing so. The adoption of these practices has been accomplished through the use of existing agency resources, and it is anticipated that the public will benefit from the resulting increase in efficiency in delivery of government services.

B. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

C. Regulatory Flexibility Act

Since notice and comment rulemaking is not necessary for this rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601–612) do not apply.

D. Executive Order 13132 (Federalism)

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (August 4, 1999), and the Service has determined that this action will not have a substantial direct effect or federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

E. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Because this rulemaking does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

F. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.) requires that FMCS consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval

from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. The Service has determined there are no new information collection requirements associated with this final rule.

G. National Environmental Policy Act

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it does not apply. The purpose of this rulemaking is to formalize the Service's administrative procedures for guidance documents. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the spring and fall of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 29 CFR Part 1473

Administrative practice and procedure, Guidance documents.

Issued in Washington, D.C. on April 6, 2020:

Gregory Goldstein,
Acting Director.

In consideration of the foregoing, the Federal Mediation and Conciliation Service adds 29 CFR part 1473 to read as follows:

PART 1473—ADMINISTRATIVE GUIDANCE

Subpart A—Guidance Documents

Sec.

- 1473.1 Purpose and scope.
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Subpart B [Reserved]

Authority: 29 U.S.C. 172 and 29 U.S.C. 173, *et seq.*

Subpart A—Guidance Documents

§ 1473.1 Purpose and scope.

- (a) This subpart prescribes general procedures that apply to guidance documents of the Federal Mediation and Conciliation Service.
- (b) This subpart governs all Federal Mediation and Conciliation Service employees

and contractors involved with all phases of issuing Service guidance documents.

- (c) This subpart applies to all guidance documents by the Service in effect on or after February 28, 2020.

§ 1473.2 Definition of guidance document.

- (a) For purposes of this subpart, the term *guidance document* means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556.
- (b) This subpart does not apply to:
- (1) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
 - (2) Rules of agency organization, procedure, or practice;
 - (3) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;
 - (4) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;
 - (5) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (e.g., case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a Government facility or property), and

correspondence with individual persons or entities (e.g., congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

- (6) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (7) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;
- (8) Guidance pertaining to military or foreign affairs functions;
- (9) Grant solicitations and awards;
- (10) Contract solicitations and awards; or
- (11) Purely internal agency policies or guidance directed solely to Service employees or contractors or to other Federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

§ 1473.3 Review and clearance by the Office of the General Counsel.

All Federal Mediation and Conciliation Service guidance documents, as defined in § 1473.2, require review and clearance in accordance with this subpart. All guidance proposed to be issued by the Service must be reviewed and cleared by the Office of General Counsel.

§ 1473.4 Requirements for clearance.

The Service's review and clearance of guidance shall ensure that each guidance document proposed to be issued by the Federal Mediation and Conciliation Service satisfies the following requirements:

- (a) The guidance document complies with all relevant statutes and regulation (including any statutory deadlines for agency action);
- (b) The guidance document identifies or includes:
 - (1) The term "guidance" or its functional equivalent;
 - (2) A concise name for the guidance document;
 - (3) The issuing department;
 - (4) A unique identifier, including, at a minimum, the date of issuance, title of the document, and a number assigned by the Office of General Counsel (or, in the case of a significant guidance document, the Z-RIN (regulation identifier number));
 - (5) The general topic addressed by the guidance document;
 - (6) Citations to applicable statutes and regulations;
 - (7) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and
 - (8) A concise summary of the guidance document's content;
- (c) The guidance document avoids using mandatory language, such as "shall," "must," "required," or "requirement," unless the language is describing an established statutory or regulatory requirement or is addressed to Service staff and

will not foreclose the Service's consideration of positions advanced by affected private parties;

- (d) The guidance document is written in plain and understandable English; and
- (e) All guidance documents include the following disclaimer prominently: "The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies." When an agency's guidance document is binding because guidance is authorized by law or because the guidance is incorporated into a contract, the agency should modify this disclaimer to reflect either of those facts.

§ 1473.5 Public access to guidance documents.

The Office of General Counsel shall:

- (a) Oversee the creation of a guidance portal on the agency's website;
- (b) Ensure all effective guidance documents, identified by a unique identifier as described in § 1473.4(b)(4), are on the guidance portal in a single, searchable, indexed database, and available to the public;
- (c) Note on the agency's guidance portal that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;
- (d) Maintain and publish on the Service's guidance portal a means for the public to comment electronically on any guidance documents that are subject to the notice-and-comment procedures, and to submit requests electronically for issuance,

reconsideration, modification, or rescission of guidance documents in accordance with § 1473.11;

- (e) Include on the agency's guidance portal the date on which all guidance documents were posted to the website, and a hyperlink to all the guidance documents;
- (f) Receive and address complaints from the public that the Service is not following the requirements of the Office of Management and Budget's (OMB) Good Guidance Bulletin, or that the Service is improperly treating a guidance document as a binding requirement;
- (g) Note on the agency's guidance portal that any guidance document not posted on the guidance portal is rescinded, and that neither the agency nor a party may cite, use, or rely on any guidance document that is not posted on the guidance portal, except to establish historical facts; and
- (h) Include on the agency's guidance portal a link to this subpart.

§ 1473.6 Waiver of publication of guidance documents.

- (a) Section 1473.5(b) and (e) does not apply to guidance documents for which a waiver has been applied from the OMB Director pursuant to Subsection 3(c) of E.O. 13891.
- (b) Requests for waivers must be written and signed by a senior policy official at the agency.

§ 1473.7 Good faith cost estimates.

Even though not legally binding, some agency guidance may result in a substantial economic impact. For example, the issuance of agency guidance may induce

private parties to alter their conduct to conform to recommended standards or practices, thereby incurring costs beyond the costs of complying with existing statutes and regulations. While it may be difficult to predict with precision the economic impact of voluntary guidance, the Federal Mediation and Conciliation Service (FMCS) shall, to the extent practicable, make a good faith effort to estimate the likely economic cost impact of the guidance document to determine whether the document might be significant. When FMCS is assessing or explaining whether it believes a guidance document is significant, it shall, at a minimum, provide the same level of analysis that is required for a major determination under the Congressional Review Act.¹ When FMCS, in consultation with OMB's Office of Information and Regulatory Affairs (OIRA), determines that a guidance document will be economically significant, FMCS will conduct and publish a Regulatory Impact Analysis of the sort that would accompany an economically significant rulemaking, to the extent reasonably possible.

§ 1473.8 Definition of significant guidance document.

(a) The term *significant guidance document* means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S.

¹ See OMB Memorandum M-19-14, Guidance on Compliance with the Congressional Review Act (April 11, 2019).

economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

- (2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;
- (3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

- (b) The term *significant guidance document* does not include the categories of documents excluded by § 1473.2 or any other category of guidance documents exempted in writing by the Office of General Counsel in consultation with OIRA.

§ 1473.9 Procedure for guidance documents identified as “significant”.

- (a) FMCS will make an initial, preliminary determination about a guidance document's significance. Thereafter, FMCS must consult with OIRA to determine whether guidance is significant guidance, unless the guidance is otherwise exempted from such a determination by the Administrator of OIRA.
- (b) Significant guidance documents, as determined by the Administrator of OIRA, must be reviewed by OIRA under E.O. 12866 before issuance; and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(c) Significant guidance documents must be signed by the Director.

§ 1473.10 Notice-and-comment procedures.

- (a) Except as provided in paragraph (b) of this section, all proposed Federal Mediation and Conciliation Service guidance documents determined to be a “significant guidance document” within the meaning of § 1473.8 shall be subject to the following informal notice-and-comment procedures. The Office of General Counsel shall publish a notice in the Federal Register announcing that a draft of the proposed guidance document is publicly available, shall post the draft guidance document on its website, shall invite public comment on the draft document for a minimum of 30 days, and shall prepare and post a public response to major concerns raised in the comments, as appropriate, on its guidance portal, either before or when the guidance document is finalized and issued.
- (b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which the Office of General Counsel finds, in consultation with OIRA, the proposing department, and the Director, good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefor in the guidance issued).
- (c) Where appropriate, the Office of General Counsel or the proposing department may recommend to the Director that a particular guidance document that is otherwise of importance to the Service’s interests shall also be subject to the

informal notice-and-comment procedures described in paragraph (a) of this section.

§ 1473.11 Petitions to withdraw or modify guidance.

- (a) Any person may petition the Office of General Counsel to withdraw or modify a particular guidance document as specified by § 1473.5(d).
- (b) The Office of General Counsel should respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

§ 1473.12 Rescinded guidance.

- (a) The Office of General Counsel, in consultation with the Director and the issuing department, shall determine whether to rescind a guidance document.
- (b) Once rescinded, the hyperlink to the guidance document will be removed. The name, title, unique identifier, and date of rescission will be listed on the guidance portal for at least one year after rescission.
- (c) No party or employee of the Federal Mediation and Conciliation Service may cite, use, or rely on rescinded guidance documents, except to establish historical facts.

§ 1473.13 Exigent circumstances.

In emergency situations or when the Federal Mediation and Conciliation Service is required by statutory deadline or court order to act more quickly than normal review procedures allow, the issuing department shall coordinate with the Office of General Counsel to notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this subpart at the earliest opportunity. Wherever practicable,

the Office of General Counsel should schedule its proceedings to permit sufficient time to comply with the procedures set forth in this subpart.

§ 1473.14 Reports to Congress and the Government Accountability Office (GAO).

Unless otherwise determined in writing by the Office of General Counsel, it is the policy of the Service that upon issuing a guidance document determined to be “significant” within the meaning of § 1473.8, the Director will submit a report to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the “Congressional Review Act”).

§ 1473.15 No judicial review or enforceable rights.

This subpart is intended to improve the internal management of the Federal Mediation and Conciliation Service. As such, it is for the use of Federal Mediation and Conciliation Service personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

Subpart B [Reserved]

[FR Doc. 2020-07523 Filed: 4/17/2020 8:45 am; Publication Date: 4/20/2020]